Supreme Court, U.S.
FILED

No. 03 1 1 5 4 FEB 1 0 2004

In The

Supreme Court of the United States

MARIAN SEARS,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Chevron* deference apply to regulations of the Department of Veterans Affairs that govern administration of veterans benefits?

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PETITION FOR WRIT OF CERTIORARI

Ms. Sears respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra 1-13) is reported at 349 F.3d 1326 (Fed. Cir. 2003). The opinion of the United States Court of Appeals for Veterans Claims (App., infra 14-30) is reported at 16 Vet. App. 244 (2002).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

38 U.S.C. § 5110. Effective dates of awards

> (a) Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts

> found, but shall not be earlier than the date of receipt of application therefore.

38 C.F.R. § 3.400 [Effective dates of awards of veterans benefits]

> (q). New and material evidence (§ 3.156) –
> (1) Other than service department records –
>
> (ii) Received after final disallowance. Date of receipt of new claim or date entitlement arose, which ever is later.

STATEMENT OF THE CASE

Ms. Sears is the guardian of the veteran, Virgil Lawton. Mr. Lawton applied for veterans' disability compensation for post-traumatic stress disorder in 1990, but the application was denied. Five years later, in October, 1995, he applied to have his claim re-opened for consideration of new evidence. The VA did re-open the claim, and it granted the benefit sought in 1997, assigning an effective date of October, 1995, the date the request to re-open was received by the VA. Mr. Lawton then appealed to the Board of Veterans' Appeals on the basis that he was entitled to an earlier effective date, the date of the original 1990 claim. The Board denied the appeal. Ms. Sears appealed on behalf of Mr. Lawton to the United States Court of Appeals for Veterans Claims. It affirmed the Board's decision in August, 2002. Ms. Sears appealed to the court below, the United States Court of Appeals for the Federal Circuit.

The court of appeals below was called upon to review the VA's regulation on effective dates of awards, 38 C.F.R.

§ 3.400(q)(1)(ii) (quoted above). Ms. Sears argued that the regulation is inconsistent with the pertinent statutes, 38 U.S.C. §§ 5108 and 5110. Ms. Sears argued that the VA's regulation should not be entitled to *Chevron* deference because of the special canons of construction which apply to veterans' benefits statutes. The court below upheld the VA regulation.

The court of appeals concluded that a veteran cannot rely upon the generous spirit that suffuses veterans' law generally to override a particular provision. The court of appeals held that it must not invalidate an otherwise reasonable agency regulation, even where the meaning of a statutory provision is ambiguous.

REASONS FOR GRANTING THE WRIT

This honorable Court should grant this petition because a United States court of appeals has decided that the special canons of construction required by this Court for the interpretation of veterans' benefits statutes do not apply to interpretations of those statutes by the Department of Veterans Affairs in its regulations.

This issue cannot benefit from development through consideration in the other circuits because the court below has exclusive jurisdiction over appeals from the Veterans Court, 38 U.S.C. § 7292(c), and the jurisdiction of the Veterans Court over appeals from the Board of Veterans' Appeals is also exclusive, 38 U.S.C. § 7252(a).

The court below relied upon this Court's doctrine of deference established in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Ms. Sears

argues that the *Chevron* approach is inconsistent with this Court's prior decisions in veterans benefits matters. The question of which doctrine of statutory construction applies to the interpretation of veterans' benefits statutes can only be resolved by this Court. The court of appeals concluded that there is no hint in *Chevron* or its progeny that this deference does not apply to Department of Veterans Affairs' regulations. The court of appeals is correct in this regard only because this issue has yet to be addressed by this Court.

The resolution of this question will have an enormous impact. In FY 1999, for example, the VA's 58 regional offices received more than 2.2 million claims. WILLIAM F. FOX, JR., THE UNITED STATES BOARD OF VETERANS' APPEALS: THE UNFINISHED STRUGGLE TO RECONCILE SPEED AND JUSTICE DURING INTRA-AGENCY REVIEW 68 (2000). That same year, the Board of Veterans' Appeals decided 37,373 appeals. Annual Report of the Chairman of the Board of Veterans' Appeals (FY 2002) at p. 15, available at http://www.va.gov/VBS/bva/annual_rpt.htm. (Though the Board's decisions fell to 17,231 in FY 2002, it decided over 30,000 appeals in each of FY 1998 through 2001. *Id.*) These appeals produce over 2,000 appeals to the Veterans Court each year, 2,397 in FY 1999. Annual Report of the U.S. Court of Appeals for Veterans Claims, at http://www.vetapp.gov/AboutCourt/AnnualReport.asp.

Ms. Sears submits that veterans and their families should be entitled to the benefit of the special canons of construction created by this Court for the review of interpretations of veterans' benefits statutes to which we turn now.

THE SPECIAL CANONS OF CONSTRUCTION OF VETERANS' BENEFITS STATUTES SHOULD APPLY TO THE DEPARTMENT OF VETERANS AFFAIRS AS THAT AGENCY INTERPRETS VETERANS' BENEFITS STATUTES.

The law governing veterans' benefits is different from all other administrative law. The statutory system for claims and adjudication is uniquely paternalistic and pro-claimant:

> In veterans law, . . . the burden of production is actually shared by the Secretary through the duty to assist. *See* 38 U.S.C. § 5107(a); *see also* 38 U.S.C. § 7722(d) ("The Secretary shall provide, to the maximum extent possible, aid and assistance (including personal interviews) to members of the Armed Forces, veterans, and eligible dependents . . . in the preparation and presentation of claims under laws administered by the Department."). Pursuant to the duty to assist, the Secretary is required to assist the claimant "in developing the facts pertinent to the claim"; that duty must be performed without regard to whether the evidence supports or detracts from the claim. Once the claim has been developed, the Secretary is required to make an impartial decision affording the claimant the benefit of the doubt where the evidence is in equipoise. The typical parley of "basic facts" and "counter proof" involved with presumptions in an adversarial proceeding does not fit the VA adjudication system where the very adjudicator, who is charged with assisting in the development of the claim, would also bear the burden of rebutting the presumption.

> *See Caluza v. Brown*, 7 Vet. App. 498, 508 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).[1]

Vanerson v. West, 12 Vet. App. 254, 260-61 (1999). It is not surprising, given the generosity of the statutory framework and legislative intent, that this Court has insisted on similar generosity when interpreting the statute.

This Court has clearly articulated how veterans' benefits statutes are to be interpreted. This Court concluded that veterans' benefits legislation must be liberally construed for the benefit of veterans. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (ambiguity in a veterans' benefits statute was to be resolved in the veteran's favor); *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see also King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221, n. 9 (1991).

The same generosity should govern the regulations in which the Department of Veterans Affairs interprets the statutes and provides for their implementation. Were it otherwise, the effect of generous interpretation of the

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[1] This description is complete but a little out of date. The first omitted phrase in the quotation above referred to the requirement that a claim be found "well grounded" before the VA's various duties to assist the claimant arose. That requirement was exaggerated in *Morton v. West*, 12 Vet. App. 477 (1999). Congress corrected the problem by repealing "well grounded." Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000). Now the threshold at which the VA's duties are triggered is the submission by the veteran of a claim for benefits that has his name on it, enough information to verify his military service, the benefit sought, and the medical condition on the basis of which it is sought. 38 U.S.C.A. § 5103(a) (West Supp. 2003); 38 C.F.R. § 3.159(a)(3) (2003).

statutes might be thwarted by the agency in their implementation. The danger of that ill effect is acute in this agency's case because its regulations were not until 1988 subject to scrutiny. In *Brown v. Gardner*, 513 U.S. 115 (1994), this Court acknowledged the observation of the Court of Appeals for the Federal Circuit "Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review." *Gardner*, 513 U.S. at 122. In fact, not until the Veterans' Judicial Review Act of 1988, Pub. L. 100-687, 102 Stat. 4105 (1988), did veterans have a forum outside the agency in which to contest such matters.

The court below, however, wrote, "In instances such as this one, where the plain language and legislative history of a statute do *not* provide clear guidance on its meaning, a regulation promulgated by the department Congress assigned to implement the statute is entitled to *Chevron* deference. Thus, the VA's gap-filling regulation must be upheld provided it is reasonable and consistent with the statutory framework." 349 F.3d at 1330 (emphasis added). Thus, the court below thwarted this Court's intent in decisions such as *Fishgold* solely and simply because it focused on the agency's interpretation of the statute instead of making its own interpretation of the statute in the first instance.

The VA's veterans' benefits regulations should not be afforded the benefit of *Chevron* deference. VA regulations are fundamentally different from the regulations of other federal agencies and should not be accorded judicial deference. The VA does not regulate commerce or business practices. It does not regulate drugs, communications, or stock exchanges. The Department of Veterans Affairs and its predecessor agency, the Veterans Administration, were

created by Congress to administer the benefits provided by statute to those citizens of this country who served this nation in its Armed Services. *Chevron* deference is appropriate and even necessary for federal agencies regulating programs, created by Congress to protect our nation as a whole. *Chevron* deference is not appropriate and should not be afforded the VA the exclusive function of which is to provide benefits to those individuals who sacrificed their lives or a portion of their lives in service to this country. Because of the effect of affording the VA *Chevron* deference, the intercession of this Court is required to determine whether the VA, in interpreting veterans' benefits statutes in regulations, must follow the special rules devised by this Court.

In 1946, *Fishgold* reviewed a statute designed "to protect the veteran in several ways." *Fishgold*, 328 U.S. at 284. The function of the Secretary of the Department of Veterans Affairs in interpreting veterans' benefits statutes likewise is "to protect the veteran." To that end, the Secretary in his interpretations of veterans' benefits statutes should be required to follow this Court's special canons of construction. There is no reason or purpose served by exempting the Secretary from an obligation imposed upon reviewing courts by this Court when those courts review veterans' benefits statutes. The special canon of construction created by this Court in *Fishgold*, *King*, and *Gardner* should trump the requirement of deference afforded to other governmental agencies. Congress created a "paternalistic" system that is "strongly and uniquely pro-claimant." *See Jaquay v. Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002) (*en banc*). This system is "imbued with special beneficence from a grateful sovereign." *Jaquay* at 1286 (*quoting Bailey v. West*, 160 F.3d

1360, 1370 (Fed. Cir. 1998) (*en banc*) (*Michel, J.*, concurring)). The *Fishgold, King*, and *Gardner* rules of statutory construction are consistent with the Congressional intent to ensure a pro-veteran policy objective. *See Jaquay* at 1288 (stating that "[t]he veteran-friendly nature of the veterans' benefits system counsels us to construe the diligence requirement . . . in favor of the veteran."). *Chevron* deference is inconsistent with and negates the special canons of statutory construction articulated in *Fishgold*, *King*, and *Gardner*.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
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03-7005

MARIAN SEARS,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Responent-Appellee.

Kenneth M. Carpenter, Carpenter Chartered, of Topeka, Kansas, argued for claimant-appellant.

Martin F. Hockey, Jr., Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for respondent-appellee. With him on the brief was *David M. Cohen*, Director.

Appealed from: United States Court of Appeals for Veterans Claims

Judge Donald L. Ivers

DECIDED: November 20, 2003

Before MICHEL, CLEVENGER, and LINN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* Michel. Opinion concurring in the judgment filed by *Circuit Judge* Clevenger.

MICHEL, *Circuit Judge*.

Appellant Sears appeals from the decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") affirming the Board of Veterans' Appeals' ("BVA's") determination that the applicable Department of Veterans Affairs ("DVA") regulation set the earliest possible effective date for service-connection benefits granted for a reopened claim as the date on which a veteran requested reopening, and therefore denying Sears' request for setting the effective date as of the date of the original application for benefits. Because the Veterans Court correctly upheld the legality of the DVA regulation expressly so limiting the earliest effective date for reopened claims, we affirm.

Background

Under section 7105(c) of Title 38, a final decision by the DVA on a veteran's claim that is not appealed may not be reopened unless statutorily authorized. 38 U.S.C. § 7105(c) (2000). The statute provides only two grounds on which otherwise finally-decided claims may be reopened. The ground at issue in this appeal is the production of "new and material evidence." *Id.* § 5108. Section 5108 provides that, "[i]f new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim."

If the evidence later presented by a veteran is deemed new and material and service connection is granted, the DVA must then determine the effective date for benefits. Section 5110(a) of Title 38, which governs the effective date for service-connection benefits, provides:

> [T]he effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall *not be earlier than the date of receipt of application therefor.*

Id. § 5110(a) (emphasis added). The DVA has issued a regulation which specifically provides that the effective date for an award following submission of new-and-material evidence is the "[d]ate of receipt of new claim or date entitlement arose, whichever is later." 38 C.F.R. § 3.400(q)(1)(ii) (2003). Thus, the DVA regulation treats a reopened claim as a "new" claim. In effect, it interprets "application therefor" in the statute to mean the application to reopen, not the original application for service-connection benefits.

In the case at bar, the veteran, Virgil Lawton,[1] served in the U.S. Army from July 1968 to July 1971. Mr. Lawton was initially denied service connection for post-traumatic stress disorder in 1990. In October 1995, Mr. Lawton filed an application to reopen his prior claim for service connection on the ground of new and material evidence. Mr. Lawton was awarded service connection in August 1997, with an effective date of October 1995, the time when he filed his request to reopen. On appeal, the BVA denied an earlier effective date, finding that 38 U.S.C. § 5110(a) and the implementing regulation required that the earliest possible effective date of the service connection was the

[1] Marian Sears, the appellant and claimant, is Mr. Lawton's guardian.

date of the application for reopening. The Veterans Court affirmed the decision of the BVA in August 2002, finding:

> no support in the law for the appellant's position that the [c]ourt should read section 5110(a)'s mandate that the effective date for a reopened claim 'shall not be earlier than the date of receipt of application therefor' as referring to the date of receipt of the *original* claim rather than the claim to reopen.

Sears v. Principi, 16 Vet. App. 244, 247 (2002) (emphasis in original). The Veterans Court also concluded that: (1) "Congress expressly specified that a claim reopened after final disallowance is distinct from the original claim that came before it," and (2) a "reopened claim [is] a 'new claim' for purposes of the effective-date language of 38 C.F.R. § 3.400(q)(1)(ii)." *Id.* at 248.

On appeal to this court, appellant argues that the DVA regulation, section 3.400(q)(1)(ii), is inconsistent with sections 5108 and 5110 of Title 38, and is thus invalid. Further, to the extent this court finds that the plain language of sections 5108 and 5110 does not alone invalidate the regulation, the appellant argues that we must still invalidate the regulation because it is inconsistent with the pro-claimant policy permeating Title 38.

We have jurisdiction pursuant to 38 U.S.C. § 7292(a) and (c).

Discussion

I.

In determining the validity of agency regulations, the first inquiry is whether the applicable statute provides a

clear statement of congressional intent on point. The Supreme Court has stated:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Thus, as we have held, "[a]n agency that has been granted authority to promulgate regulations necessary to the administration of a program it oversees may fill in gaps in the statutory scheme left by Congress." *Contreras v. United States,* 215 F.3d 1267, 1274 (Fed. Cir. 2000). Ambiguities in the veterans' statutes may also be resolved through agency regulation, "as long as the agency's action is reasonable and consistent in light of the statute and congressional intent." *Disabled Am. Veterans v. Gober,* 234 F.3d 682, 691 (Fed. Cir. 2000) (citing *Gilpin v. West,* 155 F.3d 1353, 1355-56 (Fed. Cir. 1998)).

Here, appellant argues that the DVA regulation in question conflicts with the language of sections 5108 and 5110. As noted above, section 5108 provides for the reopening of an otherwise final claim upon presentation of new and material evidence, and section 5110, that the earliest

effective date for benefits is the date of "application therefor" for an original claim, a claim reopened after final adjudication, or a claim for increase. According to the appellant, the DVA regulation, which treats a claim reopened for new and material evidence as a *new* claim (such that the "application therefor" is the request to reopen) is inconsistent with the unambiguous language of sections 5108 and 5110, in that these sections clearly characterize reopened claims as old claims that have been revived.

The appellee agrees that the language of sections 5108 and 5110 is unambiguous, but disagrees as to its meaning. According to the appellee, the language of section 5110 clearly differentiates three types of claims (an original claim, a claim reopened after final adjudication, and a claim for increase), each of which has a separate and distinct application date. Thus, according to the appellee, an original claim and a reopened claim are separate claims under section 5110(a), and each has a separate date of "application therefor."

To the extent the parties seek to characterize sections 5108 and 5110(a) as unambiguously calling for one interpretation over another, we disagree. Rather, the language of these two sections is subject to multiple interpretations. We thus look to the legislative history for guidance as to the congressional intent behind these provisions.

The parties agree that prior to 1962, the effective date of a reopened claim was the date of the request for reopening. This rule was based on two statutes. First, 38 U.S.C. § 3010 provided that "[u]nless specifically provided otherwise in this chapter, the effective date of an award of compensation, dependency, and indemnity compensation,

or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." Second, 38 U.S.C. § 3004 stated that "[w]here a claim has been finally disallowed, a later claim on the same factual basis, if supported by new and material evidence, shall have the attributes of a new claim." Because a reopened claim had "the attributes of a new claim," the effective date for a reopened claim was the filing date of that claim, not the original claim.

In 1962, Congress repealed section 3004 and amended section 3010, now section 5110. Notably, Congress did not include the language stating that reopened claims have the "attributes of a new claim." The appellee asserts, however, that this language was no longer needed, because section 3010 (now section 5110) specifically defined three separate types of claims, i.e., "an original claim, a claim reopened after final adjudication, or a claim for increase."

The appellant, on the other hand, argues that a Senate Report on the 1962 amendments undercuts the appellee's reading:

> Unless provided otherwise, the effective date of all awards of compensation, dependency and indemnity compensation, or pension will be fixed in accordance with the facts found but *will not be earlier than the date of receipt of application therefor. This is a restatement of the original claim rule in existing law. It is extended to provide uniformity by making it applicable to reopened claims as well as claims for increase now covered by sections 3004 and 3011, respectively.*

S. Rep. No. 87-2042, at 5 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3260, 3263 (emphasis added). According to the appellant, this language suggests that Congress

intended to change the then-existing law, which, as noted above, expressly treated reopened claims as new claims.

Just as with the language of the statute, this legislative history is susceptible to different interpretations. The removal of the statutory phrase "attributes of a new claim" may signal an intent for reopened claims to not have the attributes of a new claim, as the appellant suggests, or it may have been viewed as superfluous in view of the three types of claims articulated in section 5110(a). Similarly, the language quoted above from the 1962 Senate Report may be interpreted in different ways. Rather than suggesting an intent to change the existing law, the Senate Report might be read to suggest a mere rephrasing or restatement of the existing law, with no substantive changes. Thus, the legislative history, too, is ambiguous. Indeed, counsel for the appellant concedes that the legislative history does not unambiguously indicate any congressional intent behind section 5110(a), or, indeed, section 5108.

When considering the legislative context of these provisions, it is also worth noting that the DVA regulation has been in place for many years, without legislative overruling, and despite frequent legislation by Congress during the same decade on veterans' benefits. Though the duration of a regulation is not determinative of its validity, *Brown v. Gardner,* 513 U.S. 115, 122 (1994), the legislative context surrounding this particular regulation is nevertheless informative. Were the DVA regulation inconsistent with the statutory scheme intended by Congress, as the appellant urges, Congress likely would have taken steps to clarify the statute so that it unambiguously called for appellant's preferred result. Rather, Congress has repeatedly passed legislation on veterans' benefits, including legislation specifically overruling judicial and agency

interpretations of the veterans' benefits statutes, but has remained silent on this issue. With this historical context in mind, it is all the more difficult to find that the DVA regulation is inconsistent with congressional intent.

In instances such as this one, where the plain language and legislative history of a statute do not provide clear guidance on its meaning, a regulation promulgated by the department Congress assigned to implement the statute is entitled to *Chevron* deference. Thus, the DVA's gap-filling regulation must be upheld provided it is reasonable and consistent with the statutory framework. We hold that it is.

The DVA regulation does not prohibit reference back to the date of application of the original claim in all instances of reopening. Rather the VA's regulation differentiates between those cases in which the veteran's claim was originally denied due to error or inattention on the part of the government, and all other cases where the original claim was initially denied and benefits were subsequently granted based on new and material evidence. Thus, under the DVA's regulation, benefits for a claim that is denied due to clear and unmistakable error by the DVA date back to the veteran's filing of the original claim. 38 C.F.R. § 3.400(k) (2003). Similarly, a claim that is reopened for new and material evidence in the form of missing service medical records dates back to the filing of the veteran's original claim for benefits. 38 C.F.R. § 3.400(q)(2) (2003).

Section 3.400(q)(1)(ii) applies to other instances of new and material evidence, situations in which the new evidence was not presented earlier, either due to inattention by the veteran or his representatives or subsequent

advances in medicine and science. We conclude that section 3.400, which differentiates between government errors or inattention, and situations outside the control of the government, is not unreasonable.

There may be cases in which section 3.400, as applied to the particular facts of a case, does not produce the most desirable result. But a regulation is only required to operate reasonably, not perfectly. For example, consider a case where advances in medicine provide a veteran with new and material evidence demonstrating that a long-suffered medical condition, unbeknownst to everyone, actually was a result of his service; under section 3.400(q)(1)(ii), the veteran would only be entitled to benefits dating back to his request to reopen the previously-denied claim. Such cases will likely be rare, however. In the majority of cases, the regulation will produce a more desirable result, particularly because it provides the veteran with complete relief where the original denial of his claim was the result of government error or inattention.

In any event, whether to amend the statute or regulation to favor veterans in cases of new medical knowledge is for the Secretary or Congress, not this court, to decide; our review is limited to whether the Secretary's regulation is lawful. Whether it is the wisest policy is not our concern, but that of the Secretary or of Congress. It is through these institutions that veterans' advocates must seek revision of otherwise valid DVA regulations.

II.

The appellant argues, alternatively, that *Chevron* deference is inappropriate in veterans' cases such as this

one, because any interpretative doubt in the context of veterans' benefit statutes is to be resolved in the veterans' favor. *Disabled Am. Veterans,* 234 F.3d at 692 (citing *Brown v. Gardner,* 513 U.S. 115, 118 (1994)). Stated simply, the appellant argues that, even if the statutory section is ambiguous, the ambiguity must always be resolved in favor of the veteran because the pro-claimant policy underlying the veterans' benefits scheme overrides *Chevron* deference. We do not agree.

Though this court has indeed said on several occasions that we must remain conscious of the pro-claimant policy underlying the veterans' benefits scheme, in *Disabled American Veterans,* we also cautioned that "a veteran 'cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision.'" *Id.* (citations omitted). Even where the meaning of a statutory provision is ambiguous, we must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case. Here, the DVA regulation does not conflict with the spirit of the veterans' benefits scheme in any substantial way, if at all. In the vast majority of cases, the regulation provides veterans complete relief, offering special protection from government error or inattention. Such a regulation is therefore generally consistent with the pro-claimant policy suffusing the statute. Indeed, even assuming a DVA regulation sometimes operated inconsistently with the pro-claimant policy underlying the statute, the appellant has not cited, nor have we found, a single case in which this court has invalidated a regulation that would otherwise be entitled to *Chevron* deference on this ground. Nor is there any hint

in *Chevron* or its progeny that this deference does not apply to DVA regulations.

Where, as here, a statute is ambiguous and the administering agency has issued a reasonable gap-filling or ambiguity-resolving regulation, we must uphold that regulation. No adjudicatory scheme can produce perfect results in every case, and the law does not require that, to be valid, an agency regulation do so. The applicable standard is merely reasonableness, and we hold that the DVA regulation in question meets this standard.

Conclusion

We conclude that sections 5108 and 5110 of Title 38 do not clearly establish the earliest possible effective date for service connection awarded on a request to reopen. Where, as here, the DVA's gap-filling regulation is not unreasonable or otherwise impermissible, we must sustain the regulation and the result its application produces. Accordingly, the denial of an earlier effective date for service-connection benefits to Mr. Lawton, as upheld by the Veterans Court, is

AFFIRMED.

CLEVENGER, *Circuit Judge*, concurring in the judgment.

I agree with the conclusion reached by the court, namely that the effective date of an award of compensation arising from a claim that had been reopened to consider new and material evidence is the date of receipt of the application for the award.

I arrive at the same conclusion based simply on the plain meaning of section 5110(a). "Therefor" in the statutory phrase "date of receipt of application therefor" can, in my mind, have only one referent. "Therefor" refers back to "award," so the statute simply means, on its face, that "the effective date of an award based on a claim reopened after final adjudication [to consider new and material evidence] shall not be earlier than the date of receipt of the application for the award." Likewise, the statute clearly says that the effective date of an award based on an original claim, or on a claim for increased benefits, shall not be earlier than the date of the application made to gain the particular award. That "application therefor" refers only to an application for a particular award seems beyond cavil: one applies for an award. One does not apply for a claim. The award for which one applies is based on a claim.

Whether the Secretary chooses to characterize a claim that is reopened to consider new and material evidence as a "new" claim or a reassessment of the original claim seems immaterial to me for purposes of ascertaining the meaning of section 5110(a). Under the plain meaning of the statute, the effective date of any award based on a claim "reopened after final adjudication" cannot be earlier than the date of the application seeking the award.

There is no ambiguity in section 5110(a) about the effective date of various awards to which the statute refers. The plain meaning of the statute governs.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 99-1390

MARIAN SEARS, APPELLANT,

V.

ANTHONY J. PRINCIPI,
SECRETARY OF APPELLANTS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided Aug. 20, 2002)

Kenneth M. Carpenter, of Topeka, Kansas, was on the pleadings for the appellant.

Leigh A. Bradley, General Counsel; *Ron Garvin*, Assistant General Counsel; *Joan E. Moriarty*, Deputy Assistant General Counsel; and *Patricia Trujillo*, all of Washington, D.C., were on the pleading for the appellee.

Before HOLDAWAY, IVERS, and STEINBERG, *Judges*.

IVERS, *Judge*, filed the opinion of the Court. STEINBERG, *Judge*, filed a concurring opinion.

IVERS, *Judge*: Veteran Virgil G. Lawton, through his legal custodian, the appellant, Marian Sears, appeals a May 25, 1999, decision of the Board of Veterans' Appeals (BVA or Board), which denied an effective date earlier than October 26, 1995, for service connection for post-traumatic stress disorder (PTSD). The May 1999 BVA decision remanded the matter of service connection for a skin disorder, and that part of the decision has not been raised to the Court on this appeal. Pursuant to 38 U.S.C. § 7252(a), the Court has jurisdiction to consider the

current appeal, which has been timely filed. For the reasons set forth below, the Court will affirm the Board's May 1999 decision.

I. FACTS

The veteran served in the U.S. Army from July 1968 to July 1971, including service in Vietnam. Record (R.) at 15. After the veteran filed his first claim for service connection for PTSD in April 1988 (R. at 90-93), he was diagnosed with the disorder in May 1988 (R. at 103). A September 21, 1988, VA regional office (RO) decision denied the veteran's claim; a September 7, 1990, BVA decision sustained that denial. R. at 138-39, 163-67. In February 1994, the veteran had a routine VA mental disorders examination, the report of which stated that he was "not competent" for VA pension purposes. R. at 174-79. At that time, the veteran was again diagnosed with PTSD. R. at 178. In April 1995, the veteran received care and treatment for PTSD at a VA mental health clinic. R. at 181-85.

On October 26, 1995, the veteran sought to reopen his previously and finally disallowed claim for service connection for PTSD. R. at 187-90. A VA regional office (RO) decision dated August 11, 1997, granted service connection for PTSD, evaluated as 100% disabling, effective on the date of the veteran's October 1995 claim. R. at 315-17. The veteran disagreed with the effective date of the award; he asked "that compensation be granted retroactively from the incurrence of the PTSD [c]ondition." R. at 322.

In the BVA decision presently on appeal, the Board found that because a September 1988 RO decision had denied service connection for PTSD (R. at 138-39), and a

September 1990 BVA decision had affirmed that denial (R. at 163-67), that decision had become final, and, therefore, an effective date prior to September 1990 was not warranted. R. at 3. The Board concluded that an effective date prior to October 26, 1995, the date that the veteran filed his claim to reopen, was not warranted for the veteran's reopened claim for service connection for PTSD. R. at 4. With respect to the February 1994 medical examination report that diagnosed PTSD, and the April 1995 evidence of VA treatment for PTSD, the Board stated:

> [N]either of the foregoing reports served to comprise an informal claim for service connection for [PTSD] in accordance with the provisions of 38 C.F.R. § 3.157(b) (1998) inasmuch as such provision only pertains to a circumstance not incident to this aspect of the appeal, i.e., a situation in which a prior disallowance of compensation involved a service-connected condition which was not compensable in degree.

R. at 9.

II. ANALYSIS

A Board determination of the proper effective date is a finding of fact. *See Lalonde v. West,* 12 Vet.App. 377, 380 (1999); *Hanson v. Brown,* 9 Vet.App. 29, 32 (1996). The Court reviews questions of fact using the "clearly erroneous" standard of review. *Gilbert v. Derwinski,* 1 Vet.App. 49, 53 (1990); 38 U.S.C. § 7261(a)(4). In determining whether a finding is clearly erroneous, "this Court is not permitted to substitute its judgment for that of the BVA on issues of material fact; if there is a 'plausible basis' in the record for the factual determinations of the BVA . . . [the Court] cannot overturn them." *Gilbert,* 1 Vet.App. at 53.

Generally,

> the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

38 U.S.C. § 5110(a). The VA regulation concerning the effective date for a reopened claim, 38 C.F.R. § 3.400(q), provides that the effective date for an award of benefits based upon new and material evidence, other than evidence from service department records, that was received after final disallowance of a claim is the "[d]ate of receipt of [the] new claim or [the] date entitlement arose, whichever is later." 38 C.F.R. § 3.400(q)(1)(ii) (2001).

A.

The appellant does not assert that the Board's determination of the proper effective date was "clearly erroneous." *See Lalonde, supra.* Instead, in her brief for this appeal, the appellant urges the Court to interpret 38 U.S.C. § 5110(a) to find that the effective date of a reopened claim should be the date of the original claim, not the date of the application to reopen that claim after a prior, final adjudication. To that end, she argues that 38 C.F.R. § 3.400(q)(1)(ii) is inconsistent with the plain meaning of section 5110(a), and with 38 U.S.C. § 5108 (Reopening Disallowed Claims), because the regulatory provision uses the terminology "new claim." Appellant's Brief (Br.) at 5-14; Reply Br. at 2.

The appellant's argument lacks merit, and seeks an interpretation that, although favorable to the veteran in the present matter, would convolute the plain meaning of the statutory and regulatory scheme for determining effective dates. The generally applicable parts of the effective-date statute and regulation delineate three types of "claims": (1) An original claim, (2) a claim reopened after final disallowance, and (3) a claim for an increase in benefits. *See* 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400. The use of the term "new claim" in 38 C.F.R. § 3.400(q)(1)(ii) refers to the second of the three types of claims to which the regulation and statute are generally applicable, i.e., a claim reopened after final disallowance. *See* 38 C.F.R. § 3.400(q)(1)(ii) (part of the regulation governing effective dates that applies when new and material evidence is received after final disallowance of a claim). Furthermore, there is no support in the law for the appellant's position that the Court should read section 5110(a)'s mandate that the effective date for a reopened claim "shall not be earlier than the date of receipt of application therefor" as referring to the date of receipt of the ***original*** claim rather than the claim to reopen. *See Wright v. Gober,* 10 Vet.App. 343, 345-47 (1997). In *Wright,* the Court held that the words "application therefor" in section 5110(b) "means the application that resulted in the award of disability compensation currently under review for an effective date", *id.* at 347; the same rationale applies as to section 5110(a).

The Court also rejects the appellant's assertion that, "by its very nature, a claim for reopening overcomes the finality of the previously denied claim because it requires a thorough review of the former disposition of the original claim." Appellant's Br. at 6. In urging that the regulatory provision found at 38 C.F.R. § 3.400(q)(1)(ii) is invalid, the

appellant would have the Court overturn its body of precedential law that upholds the interpretation of the relevant language of 38 U.S.C. § 5110(a) to mean that an award granted on a reopened claim will be effective no earlier than the date that the claim for reopening was filed. *See* Appellant's Br. at 9 (citing *Flash v. Brown,* 8 Vet.App. 332, 340 (1995); *Lapier v. Brown,* 5 Vet.App. 215, 216-17 (1993); *Spencer v. Brown,* 4 Vet.App. 283, 293 (1993), *aff'd,* 17 F.3d 368 (Fed. Cir. 1994); *Rowell v. Principi,* 4 Vet.App. 9, 14 (1993).

In *Spencer, supra,* the Court provided an in-depth analysis of the validity of the requirement that the Secretary adjudicate a previously and finally denied claim upon receipt of new and material evidence relative to the claim. *Spencer,* 4 Vet.App. at 290-97. In the context of that analysis, the Court stated the following:

> [I]t is made clear [by 38 U.S.C. § 5110(a)] that such "reopening" will not have retroactive effect relating back to the original claim but will have the attributes of a ***new*** claim with regard to effective date. Although, as noted in subpart iii., above, the use of "reopening" in prior statutory provisions may have connoted only adjudication of a finally denied claim on the basis of the original application, with any award being retroactive to the date of that application, the use of that term in [§ 5110(a)] since 1962 and in § 5108 pursuant to the VJRA makes clear that "reopening" now refers as well to claims based on new and material evidence from sources other than service department reports; in essence, such claims are treated as new claims.

Id. at 297. The Court thus holds that the effective-date statute, 38 U.S.C. § 5110(a), is clear on its face with

respect to granting an effective date for an award of VA periodic monetary benefits no earlier than the date that the claim for reopening was filed.

The appellant's argument that 38 U.S.C. § 5108 precludes considering a reopened claim to be a "new claim" does not support her contention regarding effective dates for awards based upon reopened claims. The reopening of a claim is an exception to the rule of finality stated in 38 U.S.C. § 7104(b) (Jurisdiction of the Board). The rule explicitly states: "Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." 38 U.S.C. § 7104(b); *see also* 38 U.S.C. § 7105(c) (finality of RO decisions). Section 5108 requires that a claim that has been disallowed be reopened "[i]f new and material evidence is presented or secured." 38 U.S.C. § 5108; *see* 38 C.F.R. § 3.156(a) (2001). If the claim is reopened, then a new factual basis emerges (from the new and material evidence along with the existing evidence), upon which the reopened claim is to be considered. *See Thompson v. Derwinski,* 1 Vet.App. 251, 253-54 (1991) (discussing of rule of finality and new factual basis established by new and material evidence).

This new factual basis renders the reopened claim a "new claim" for purposes of the effective-date language of 38 C.F.R. § 3.400(q)(1)(ii). Reading the regulatory provision in this manner is consistent with the statutory framework established by 38 U.S.C. § 7104(b), regarding jurisdiction and the rule of finality, and 38 U.S.C. § 5110(a), regarding the assignment of effective dates. For purposes of setting effective dates, Congress expressly specified that a claim reopened after final disallowance is

distinct from the original claim that came before it. *See* 38 U.S.C. § 5110(a). Further, Congress expressly prohibited, on jurisdictional grounds, consideration of a claim that has been finally disallowed by the Board on the same factual basis. *See* 38 U.S.C. § 7104(b); *Barnett v. Brown,* 83 F.3d 1380, 1383 (holding that section 7104(b) "means that the Board does not have jurisdiction to consider a claim which it previously adjudicated unless new and material evidence is presented, and before the Board may reopen such a claim, it must so find"); *see also* 38 U.S.C. § 7105(c).

The statutory framework simply does not allow for the Board to reach back to the date of the original claim as a possible effective date for an award of service-connected benefits that is predicated upon a reopened claim. The rule of finality regarding an original claim implies that the date of that claim is not to be a factor in determining an effective date if the claim is later reopened. The presence of a reopened claim as one of three types of claims referred to in the effective-date statute reinforces this interpretation. In light of this harmonious analysis of the relevant statutes and the regulation, the Court holds that the term "new claim," as it appears at 38 C.F.R. § 3.400(q)(1)(ii), means a claim to reopen a previously and finally denied claim.

B.

The appellant argues, alternatively, that for purposes of allowing an effective date earlier than the date of a claim to reopen, the regulatory provision providing effective dates for claims for increased disability ratings should apply to claims to reopen. Appellant's Br. at 14-18. In making this argument, the appellant has analogized the

duo of claims for increased ratings and claims to reopen to certain *informal* claims for increased ratings and claims to reopen.

The appellant points out that 38 C.F.R. § 3.157 treats informal claims for increased ratings and informal claims to reopen, based upon reports of medical examination or hospitalization, the same for purposes of determining effective dates. Appellant's Br. at 14-18. She then asserts that the effective-date provisions of 38 C.F.R. § 3.400(o)(2) (effective dates for increases) should, therefore, apply to claims to reopen. *Id.* The appellant contends that because 38 C.F.R. § 3.400(o)(2) provides that the effective date for an award of benefits based upon a claim for an increased rating can be the earliest date that it is factually ascertainable that an increase in disability has occurred, an effective date for an award arising from a reopened claim can be the earliest date that it is factually ascertainable that the condition for which the award is made existed. *Id.*

The Court will not accept the appellant's apparent invitation to override the limits of the effective-date provisions presently in the regulations. Regulatory section 3.157 applies to a defined group of claims, i.e., as to disability compensation, those claims for which a report of a medical examination or hospitalization is accepted as an informal claim for an increase of a service-connected rating where service connection has already been established. *See* 38 C.F.R. § 3.157 (2001); *Servello v. Derwinski,* 3 Vet.App. 196, 199 (1992). The specific effective-date provisions of 38 C.F.R. § 3.157 do not supercede or conflict with the effective-date provisions of 38 C.F.R. § 3.400 that are applicable to claims for increased disability compensation and claims reopened with new and material evidence. *See* 38 C.F.R. §§ 3.400(o)(2) and (q).

Regulatory section 3.400 begins with the following: "General: Except as otherwise provided, the effective date . . . will be. . . . " 38 C.F.R. § 3.400. Section 3.157 and the subsections of section 3.400 *provide otherwise* for effective dates related to the types of claims they respectively define. *See* 38 C.F.R. § 3.157 (report of examination or hospitalization accepted as informal claim, and date of report accepted as date of claim, which date is a determining factor in deciding the effective date of an award of benefits); 38 C.F.R. § 3.400(o)(2) (effective dates for successful claims for increases in disability compensation); 38 C.F.R. § 3.400(q) (effective dates for successful claims reopened with new and material evidence).

The Court holds that it was not erroneous for the Board to conclude that no informal claims had been filed pursuant to 38 C.F.R. § 3.157. *See* R. at 9. The Court will not override the relevant effective-date regulatory provision in this case, 38 C.F.R. § 3.400(q), in favor of extending the unrelated provision of 38 C.F.R. § 3.400(o)(2).

C.

The final alternative argument advanced by the appellant is that the language of 38 C.F.R. § 3.157 prohibits the filing of an informal claim for reopening, contrary to the pro-veteran nature of the veterans benefits system. Appellant's Br. at 19-25. In making this argument, the appellant misconstrues that regulation.

As discussed above, 38 C.F.R. § 3.157 applies to a quite-specific group of claims for disability compensation, i.e., those that are considered informal claims on the basis of a submission of a report from a medical examination or hospitalization. The regulation allows for the reports to

serve as informal claims for increased disability compensation for service-connected conditions, and as claims to reopen finalized claims regarding service-connected conditions, presumably in an effort to gain compensation. *See Servello, supra.* The regulation does not, as alleged by the appellant, "effectively preclude[ ] informal claims for reopening." Appellant's Br. at 24.

III. CONCLUSION

Accordingly, upon consideration of the record on appeal and the parties' pleadings, and for the reasons stated herein, the Court holds that the Board's denial of the appellant's request for an earlier effective date was not "clearly erroneous." *See Lalonde, Hanson,* and *Gilbert,* all *supra.* The May 25, 1999, BVA decision is AFFIRMED.

STEINBERG, *Judge,* concurring: I concur in the Court's decision and join in the opinion, except with respect to the statement in part II.C. that 38 C.F.R. § 3.157(b) "allows for the reports" from a medical examination or hospitalization "to serve as . . . ***claims to reopen*** finalized claims regarding service-connected conditions, presumably in an effort to gain compensation". I write separately to address 38 C.F.R. § 3.157(b) and the conflicted language that renders that regulation virtually impossible to apply.

Regulatory § 3.157(b) discusses the circumstances under which, inter alia, a report of examination or hospitalization may serve as an informal claim for an increased rating or an informal claim to reopen. The regulation states, in pertinent part:

> (b) *Claim.* Once a formal claim for pension or compensation has been allowed or a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree, receipt of one of the following will be accepted as an informal claim for increased benefits ***or an informal claim to reopen.*** In addition, receipt of one of the following will be accepted as an ***informal claim*** in the case of a retired member of a uniformed service whose formal claim for pension or compensation has been disallowed because of receipt of retirement pay. The evidence listed will also be accepted as ***an informal claim*** for pension previously denied for the reason the disability was not permanently and totally disabling.
>
> (1) *Report of examination or hospitalization by [VA] or uniformed services. . . .*
>
> (2) *Evidence from a private physician or layman. . . .*
>
> (3) *State and other institutions. . . .*

38 C.F.R. § 3.157(b) (2001) (emphasis added). I find it virtually impossible to divine the meaning of the emphasized words in the context of the seemingly unconnected three sentences in subsection (b).

That part of the Court's opinion quoted above suggests that there can be a claim to reopen in the case of a claim to gain compensation for a service-connected condition. I find that language quite difficult to follow, but, in fairness, those words appear simply to mirror the "confusing tapestry" of the language of the regulation. *Hatlestad v. Derwinski,* 1 Vet.App. 164, 167 (1991); *see also Zang v. Brown,* 8 Vet.App. 246, 255 (1995) (Steinberg, J., separate views).

The one thing that does appear to be clear about § 3.157(b) is that, as to a disability that has been found to be service connected – whether or not rated as compensable – or as to non-service-connected pension that has been awarded, the submission of one of the types of evidence listed in paragraphs (1), (2), or (3) of subsection (b) will constitute an informal claim for increased benefits. 38 C.F.R. § 3.157(b). Otherwise, however, the regulation contains internal contradictions that render it largely incomprehensible; in my view, this regulation should be near the top of the list for revision, as part of a regulatory review process that, in one form or another, has been underway for some time at the Department of Veterans Affairs (VA),[1] in order to resolve the following issues:

1. What is the meaning of the term "an informal claim to reopen" as used in the first sentence of § 3.157(b) to describe how certain specified evidence might be accepted? This sentence describes three types of claims in which such evidence might be accepted for purposes of "reopening", but it appears that none of those type of claims could actually be the subject of a claim to reopen. The regulation refers first to "a formal claim for pension or compensation [that] has been allowed"; however, under 38 U.S.C. § 5108, a claim may be reopened only where "new and material evidence is presented or secured with respect to a claim ***which has been disallowed***". 38 U.S.C. § 5108 (emphasis added); *see also* 38 U.S.C. §§ 7104(b); 7105(c). Therefore, it appears clear that claims that have been

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[1] *See Zang v. Brown*, 8 Vet.App. 246, 255 (1995) (Steinberg, J., separate views) (listing VA regulations needing "review and reevaluation by the Secretary").

allowed are not eligible for reopening. *Ibid.* Furthermore, as to "a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree", the Court has held that a claim for a compensable rating for a service-connected condition is a claim for an increased rating and a new claim and is not subject to the requirements, regarding the presentation of new and material evidence, as applicable to claims to reopen. *Proscelle v. Derwinski,* 2 Vet.App. 629, 631 (1992); *see Butts v. Brown,* 5 Vet.App. 532, 535 (1993) (en banc).[2]

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[2] The law with regard to the nature of claims for a higher rating evolved quite a while ago to the point where it is routinely considered that such a claim is a claim for an increased rating and is a new claim, and is not a claim to reopen. *See, e.g., Spurgeon v. Brown,* 10 Vet.App. 194, 196 (1997) ("appellant's claim for an increased rating . . . is 'a new claim' ") (quoting *Cox v. Brown,* 6 Vet.App. 459, 460 (1994), and citing *Butts v. Brown,* 5 Vet.App. 532, 535 (1993) (en banc)); *Stanton v. Brown,* 5 Vet.App. 563, 565 (1993) ("claim for increased evaluation . . . is a new claim") (citing, inter alia, *Proscelle, infra*)); *Suttmann v. Brown,* 5 Vet.App. 127, 137 (1993) (holding that "a repeat claim for a . . . rating [of total disability based on individual unemployability], where a similar claim has been previously and finally denied, should be viewed as a new claim" and that the same "applies to claims for service connection for the [former prisoner of war (POW)] . . . diseases listed in 38 U.S.C.[ ] § 1112(b) and 38 C.F.R. § 3.309(c) . . . [, which provide that] any listed . . . disease becoming manifest to a degree of 10% or more in a former POW ***at any time after separation from service*** " will be awarded disability compensation); *Lenderman v. Principi,* 3 Vet.App. 491, 492 (1992) (characterizing *Proscelle v. Derwinski,* 2 Vet.App. 629 (1992), as holding "that a claim for an increase is a new claim, and, therefore, [is] not subject to the provisions [that] require that an appellant submit new and material evidence before a claim will be reopened"). However, the first case to make this holding not only, as stated in the text above, involved a claim for a compensable rating for a zero-rated service-connected disability, but also based its conclusion that such a claim was not a claim to reopen on the concept that "because the claimant's entitlement to benefits could be predicated on a finding that the service-connected disability had increased ***since*** the

(Continued on following page)

Therefore, it appears that "a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree" may not form the predicate for a claim to reopen, either.[3]

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prior denial, . . . the claim was based upon facts different from the prior final claim." *Suttmann,* 5 Vet.App. at 136 (describing holding of *Proscelle, supra*). In *Proscelle* itself, the Court had explained that "because the veteran claims that his service-connected disability has undergone an increase in severity ***since*** that prior claim . . . [, t]he current claim is thus a new claim." *Proscelle,* 2 Vet.App. at 631. At this point, the proposition in the text above appears to be accepted as a truism without regard to whether a veteran actually asserts that his or her service-connected disability has increased in severity since last rated by VA, a factor neither discussed nor apparently present in *Spurgeon, Stanton,* or *Lenderman,* all *supra.* For example, in a brief filed in this Court on April 12, 2002, the Secretary asserted, without any qualification, citing *Spurgeon* and *Proscelle,* both *supra:* "A claim for an increase is a new claim." Secretary's Brief at 11, *Acton v. Principi,* U.S. Vet.App. No. 01-0564 (Notice of Appeal filed March 28, 2001). Prior to November 9, 2000, when the Veterans Claims Assistance Act of 2000, Pub.L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) (VCAA), was enacted, the principal difference between an original claim and a claim to reopen pertained to the Secretary's duty to assist and the lesser applicability of that duty to a claim to reopen. That distinction is maintained in at least one major respect in the regulations issued on August 29, 2001, implementing the VCAA; in those regulations, as to claims to reopen, a VA medical examination will be provided "only if new and material evidence is presented or secured." 66 Fed.Reg. 45,620, 45,631 (Aug. 29, 2001) (amending 38 C.F.R. § 3.159(c)(4)(iii)).

[3] It appears that, at the time that the Secretary promulgated § 3.157(b) in 1961, he may have considered that claims for disability compensation were "disallowed" when service connection was found but a compensable rating was denied. That is because until 1993 the Rating Schedule did not provide for a zero-percent rating for ***every*** disability for which the applicable diagnostic code did not specifically include a zero-percent rating. In 1993, 38 C.F.R. § 4.31 was amended to provide, just as it does today (38 C.F.R. § 4.31 (2001)), as follows:

(Continued on following page)

2. What is the meaning of the term "informal claim" in the second and third sentences of the regulation; does that phrase refer to an informal claim to reopen, to an informal original claim, or to both?

3. How does the third sentence of § 3.157(b), which points out a circumstance in which the listed evidence will be accepted as "an informal claim" (apparently, as an informal claim to reopen), comport with the first sentence of the regulation? Specifically, the provision made in the third sentence for "informal claim[s] for pension previously denied for the reason [that] the disability was not permanently and totally disabling" describes a completely different situation in pension law from that described in the first sentence relating to claims for pension that have "been allowed". It appears that the third sentence describes the only circumstance in which the evidence listed in paragraphs (1), (2), and (3) will be accepted as a claim to reopen a claim for pension, but there is no explanation as to how the third sentence relates to the first sentence, which contains the sole such reference in subsection (b) to a "claim to reopen" but appears to relate only to the types of claims described in that ***first*** sentence.

> In every instance where the schedule does not provide a zero percent evaluation for a diagnostic code, a zero percent evaluation shall be assigned when the requirements for a compensable evaluation are not met.

38 C.F.R. § 4.31 (1993) (amending former regulation, which first appeared in title 38 of the Code of Federal Regulations in 1965 and provided for "a no-percent evaluation . . . when the required residuals are not shown", 38 C.F.R. § 4.31 (1992)); *see Rabideau v. Derwinski*, 2 Vet.App. 141, 143 (concluding that because "the schedular criteria for hypertension do not require residuals, a zero-percent rating would not be authorized under . . . [38 C.F.R. §] 4.31").

In effect, it appears that the Secretary has failed to update this regulation (assuming that it was coherent at one point), which was prescribed initially in 1961 with substantially similar language, 38 C.F.R. § 3.157(b) (1962), to accord with precedential judicial authority.[4] Now would seem an opportune time for the Secretary to review this regulation.

[4] *See supra* note 2.